Supreme Court, U. S.
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No. 188

Supreme Court of the United States

OCTOBER TERM—1951

GEORGE GILLETTE,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

VINE H. SMITH,
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Of Counsel.

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POINT FIRST: *Petitioner was indicted for transporting in interstate commerce forged securities from the Southern District of New York. The proof showed that the securities were transported, not from the Southern District of New York but from the Eastern District of New York. Nevertheless, the Court of Appeals affirmed the conviction on the eighth count, on the theory that the jury must have found that accessorial acts were committed in the Southern District of New York. Nothing was said about that in the indictment. Nothing was said about that in the court's instructions. The court charged the jury that the problem was to find whether there was transportation "from the State of New York" to*

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another state. Whether the jury did or did not find beyond a reasonable doubt that accessorial acts were committed in the Southern District of New York, no one can say. The finding of the Court of Appeals that accessorial acts were so committed was an original finding, beyond the power of that court, and apparently made in conflict with an applicable decision of this Court. 15

POINT SECOND: *The indictment charges transportation from the Southern District of New York. That transportation was not proved. The Court of Appeals upheld the conviction upon the theory that petitioner became an "accessory" in the Southern District of New York. But the indictment does not allege that petitioner became an "accessory" in the Southern District of New York. It charges actual transportation from the Southern District of New York to a district in another state.* 21

POINT THIRD: *Although the proof showed that the offense was committed outside the jurisdiction of the Court, the Court of Appeals held that petitioner was properly convicted, nevertheless, because there was proof of accessorial acts within the jurisdiction of the court. The Court of Appeals reasoned that since, at common law, an accessory is triable where accessorial acts are committed, since the statute makes him who aids or abets, counsels or advises, a prinicpal, this "does not supersede the common law of venue but provides an additional venue." The court overlooked the fact that there are not and never were accessories before the fact under federal*

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law, and hence when one who aids or abets was made a principal, there was no pre-existing rule of venue to broaden. Furthermore, the Court of Appeals ignored the Sixth Amendment to the Constitution which requires crimes to be prosecuted in the district "where the crime shall have been committed," not where it was counseled or advised. Also it must have overlooked so much of the Sixth Amendment as requires that one "be informed of the nature and cause of the accusation." 23

POINT FOURTH: *Over petitioner's objection a government witness was permitted to testify, that in petitioner's absence, "I was told by Joseph Di Palermo that if anything went wrong I had nothing to worry about in this case and that Gillette was backing the deal." The Court of Appeals excused this on the theory that the statement was "made to encourage Larigan, newly admitted to the conspiracy, to act as a check passer." There is no evidence that it was so made, or that Larigan needed any encouragement.* 26

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Supreme Court of the United States

OCTOBER TERM—1951

GEORGE GILLETTE,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

To the Honorable, The Chief Justice, and the Associate Justices of the Supreme Court of the United States:

This, the petition of George Gillette, a resident of the Borough of Brooklyn, City and State of New York, respectfully shows:

I.

This is a petition for the issuance of a writ of certiorari to the United States Court of Appeals for the Second Circuit, to review a judgment of that court affirming in part a judgment of conviction rendered against the petitioner under an indictment charging transporting, and conspiring to transport, in interstate commerce, certain forged checks.

II.

Jurisdiction

This court has jurisdiction because the petitioner is seeking a review of a judgment rendered by the United States Court of Appeals for the Second Circuit, and provision for the exercise of such jurisdiction is made by Fed-

eral Statutes and Rules (U. S. C. Title 28, Section 1254, Rule 37(b) of the Rules of Criminal Procedure and Rule 38 of the Rules of this court).

Basically, the jurisdiction of the Federal courts, and in particular of this Court, further appears from the nature of the questions presented. Those questions (see IV *post*) include the inquiry whether the Sixth Amendment to the Constitution of the United States permits the conviction of a defendant in the Southern District of New York under an indictment charging a crime in that district, when the evidence shows—as the Court of Appeals holds (830*)—that the offense was not committed in that district. The Court of Appeals, in deference to the Sixth Amendment, reversed the conviction as to one substantive count, but as to another, sustained the conviction on the ground that, as to the offense therein concerned, the defendant had been shown to have become "an accessory [before the fact] in Manhattan" in the Southern District, which, at common law, might have made him subject to prosecution there as such accessory (830-1).

This petition for certiorari is timely because the Court of Appeals denied this petitioner's application for rehearing in its final opinion and decision rendered on June 4, 1951 (855-7), and Mr. Justice Jackson of this Court, by order made within thirty days thereafter, to wit, June 18, 1951, extended the time for filing "to and including July 15, 1951." This petition is filed within the time as so extended.

The decision of the Court of Appeals has not been reported at the time of the writing of this petition. Both the original and final opinions of the Court of Appeals appear in the record (828-34, 855-7).

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* Numerals in parentheses in this petition and in the annexed brief refer to pages of the transcript of record, unless otherwise indicated.

III.

The Nature and History of the Case

A short but adequate statement of the character of this case and the questions involved may be found in petitioner's application for rehearing, the prosecution's answer, petitioner's reply thereto, and the final opinion of the Court of Appeals rendered on June 4, 1951, all of which are contained in the record (835-57).

For the purposes of this petition, the proceedings herein may be briefly outlined. The petitioner, George Gillette, with various others, was charged in an indictment filed in the Southern District of New York in nine substantive counts, with the crime of transporting, with unlawful and fraudulent intent, in interstate commerce, certain forged securities, to wit, American Express Travelers Cheques (18-24), in violation of U. S. C. Title 18, Section 2314, and in a further count, the Tenth, with conspiring so to do, in violation of U. S. C. Title 18, Section 371 (24-8). Each of the substantive counts charged the defendants with transporting such spurious cheques to and from "the City, County, State and Southern District of New York."

The cause came on for trial in the Southern District of New York before Hon. J. Waties Waring, District Judge, sitting by assignment in that district, and a jury.

At the close of the prosecution's case, the trial court, on motion of defendant, George Gillette, directed an acquittal on the first seven counts of the indictment, holding that there was no evidence tending to implicate him in any of the various instances of interstate transportation, alleged in those counts (617, 621, 623, 635-6). In reaching this conclusion, the trial court necessarily and expressly held unproved the prosecutor's assertions of Gillette's connection with the overall conspiracy and his assumption of the role of supervision of its operation (616, 617).

The court, however, held that there was evidence requiring submission to the jury of the question whether Gillette was a participant in the conspiracy (Tenth Count) and in the transportation of some of the spurious checks from New York to Chicago (Eighth Count) and from New York to Los Angeles (Ninth Count). The jury returned a verdict of guilty as to these three counts (787).

The court imposed sentence of imprisonment for ten years under the eighth count; ten years under the ninth count, these terms to run consecutively, and five years under the tenth count, the conspiracy count, to run concurrently. It further imposed fines of $7,500. on each of the substantive counts and $5,000. on the conspiracy count. The aggregate period of imprisonment thus imposed was twenty years and the total of the fines was $20,000. (818).

At the trial, counsel for the defendant, Gillette, the petitioner herein, besides moving for acquittal on the general ground that the proof was insufficient, brought to the Court's attention, by motion, the specific objection that there was no proof of interstate transportation originating in or passing through the Southern District of New York, and no evidence of the existence of any purpose or plan for such interstate transportation until after the spurious checks had been taken to the Eastern District of New York. As to the eighth, ninth and tenth counts, the court denied all petitioner's motions for acquittal or dismissal. [The Court of Appeals, it is to be noted, agrees with petitioner as to the effect of the evidence upon this point and holds that there is no proof of interstate transportation from, through or in the Southern District of New York—830.]

Trial counsel for the petitioner, thereupon, assuming that the question as to where the interstate transportation originated would be left to the jury as one of fact, discussed this question in his summation (700-1). The court, however, did not leave this issue to the jury, even

as a question of fact, but charged that the question was whether the transportation was *"from the State of New York to other states"* (754). Petitioner's attorney called this portion of the charge to the attention of the trial judge, excepted to his failure to submit to the jury the question as to whether the interstate transportation was from the Southern District of New York, as alleged in the indictment, and requested a charge submitting such issue (774), but the trial judge, adhering consistently to the theory of his main charge that the question was whether the transportation was from the State of New York, refused this request (774).

The defendant's counsel also repeatedly objected to the sufficiency of the prosecution's proof under any of the counts of the indictment and further objected to certain rulings of the court upon evidence, in particular to the admission of hearsay statements made by members of the conspiracy in the defendant's absence (204-5, 598).

Petitioner appealed to the United States Court of Appeals for the Second Circuit. That court affirmed the conviction of the substantive offense charged in the eighth count (transportation from New York to Chicago), reversed the conviction under the ninth count (transportation from New York to Los Angeles) and affirmed the conviction under the tenth count for conspiracy (828 *et seq.*). This decision was rendered on April 11, 1951.

By petition filed pursuant to the rules of the Court of Appeals, the petitioner, on April 26, 1951, applied for re-hearing. Thereafter by direction of the Court of Appeals, the prosecution filed an answer to the second ground stated in the petition for re-hearing (848-54). The petitioner filed a reply to the prosecution's answer, which reply, of course, appears in the record (852-5). The Court of Appeals in its final opinion and decision dated June 4, 1951, adhered to its original view that, although there

was neither evidence nor—under the trial court's charge—a finding by the jury of interstate transportation from the Southern District of New York, as alleged in the indictment, nor even a finding of any "accessorial" act of petitioner in that District, nevertheless, there was evidence upon which the defendant Gillette, at common law, could have been found to have become an "accessory" in that district and that, although that question of accessorial status had not been submitted to the jury, which omission the court said was error (831), nevertheless, the jury must be presumed to have found the facts essential to its determination (831-2).

The defendant is now imprisoned pursuant to the judgments aforesaid.

IV.

Questions Presented

1. As to the eighth count, a substantive count charging transportation of the forged checks from the Southern District of New York to Chicago, Illinois.

(a) It appearing that no part of such transportation was from or in that district and that the averment of the indictment respecting the same was unproved, and under the charge not even found by the jury, can the conviction and venue be justified, notwithstanding the Sixth Amendment, on the ground that petitioner became, in the Southern District, an accessory to the interstate transportation in and from a different district?

(b) Can the conviction be justified, notwithstanding that the accessorial offense is not alleged in the indictment, that no such crime as being an accessory before the fact exists under the statutes of the United States and, of course, that no penalty for such offense has been authorized by any such statute?

(c) No grand jury having accused the petitioner of being an accessory—even if the offense of being such accessory before the fact existed—does the affirmance based on that offense violate the provision of the Fifth Amendment to the Constitution which prohibits trial or conviction of infamous crime except upon presentment or indictment duly returned by a grand jury?

(d) There being no submission to the jury of the question whether petitioner became in the Southern District of New York an accessory or abettor, can the Court of Appeals, itself, determine that in fact (and beyond a reasonable doubt) he did so?

(e) Apart from constitutional questions, can the failure to prove interstate transportation from or in the Southern District of New York and the proof instead of such transportation from and in a different district properly be treated as immaterial?

(f) Can the conviction obtained under the unproved accusation that petitioner was a principal be justified on the ground first presented in the appellate court, that he was an accessory?

2. As to all three counts.

Was the admission of hearsay statements made in petitioner's absence, and over his objection, erroneous and prejudicial?

V.

Reasons for Allowance of Writ

1. The Court of Appeals, in affirming the conviction under the eighth count, although holding that such count was not proved and not even properly submitted to the jury, decided the questions above specified in 1(a) to (c) (*ante*) erroneously, and in violation of petitioner's rights under the Fifth and the Sixth Amendments. (See Points Second and Third of the Annexed Brief.)

2. The Court of Appeals in such affirmance decided the questions stated (*ante*) in 1(d) to (f) in a manner which departs from the accepted and usual course of judicial proceedings, and, moreover, is in plain conflict with applicable decisions of this Court, in particular—

Bollenbach v. *United States,* 326 U. S. 607, 610.

This decision was brought to the attention of the Court of Appeals (845). The Court of Appeals in its final opinion (857) undertakes to distinguish it (856-7). The distinction urged is that in the case at bar the jury "could not have convicted Gillette on count 8 unless they found that he aided and abetted the transportation from New York to Chicago and the only evidence of his participation in the scheme prior to the arrival of the checks in Chicago was Larigan's testimony as to what occurred at the meeting in Manhattan on August 19th. Hence, the jury must have believed this testimony, unless they disregarded the instructions, which we may not assume."

This statement is erroneous both in its assumption as to the law and in its reading of the record. The fallacy in the Court's reasoning is in the assumption indicated by the words "and the only evidence of his participation," etc.

Whether or not the account of the meeting in the restaurant in Manhattan should be regarded as the only evidence of the petitioner's participation in the substantive offense is not controlling. The point is that the jury was instructed that it must consider all the evidence relating to the petitioner's association with any of the conspirators anywhere, in New York, in Chicago or in Los Angeles, for the purpose of determining his guilt or innocence under each of the counts (763).

The jury was not told that it had to find or determine specifically what acts of abetting or participation the petitioner had committed or where he had committed them but, if on the whole record, the jury was satisfied that he had become a participant in the plan to transport from the State of New York to another state before the checks were actually transported, he was guilty. Actually the only thing said to have happened at the restaurant in Manhattan tending to inculpate petitioner was the statement elicited from Larigan, with some leading on direct examination, that petitioner said he wanted to go out to supervise (203-4). This statement, however, he did not include when he was again asked repeatedly on cross examination to state the whole conversation (265-6).

Now, even if the jury were not satisfied beyond a reasonable doubt that petitioner at the restaurant in Manhattan actually said what Larigan quoted him as saying, they could still, under the instructions, have found from the evidence of his being in Chicago and Los Angeles when the active participants in the illicit enterprise were there, that he had had, prior to the interstate transportation, become an abettor of that offense. That this is what the court intended the jury to understand is further clear from his similar instruction regarding the defendant Borda, who was charged with being a participant in the transportation from New York to Los Angeles and in the conspiracy.

There was no evidence that Borda had ever been in the Southern District or, indeed, in the State of New York at all. The evidence of his participation was the timeliness of his arrival in Los Angeles for the purpose of acting as a check passer. Nevertheless, the court charged as to him that the jury could infer from Borda's association with the conspiracy in Los Angeles that he had been a party to the earlier interstate transportation (762, fol. 2285).

Precisely, the same freedom was accorded the jury in the court's instruction as to the petitioner. The assumption of the Appellate Court that the jury must have found that the petitioner became a participant and an "accessory" in the Southern District of New York is not in accord with the record and is in substance an independent finding of fact by the Appellate Court. (See Point First of the Annexed Brief.)

3. The Court erroneously admitted evidence of hearsay statements made by members of the conspiracy and participants in the substantive offenses in the petitioner's absence which were prejudicial to him and not justified by any of the exceptions authorizing the admission of such statements when made in the execution of the conspiracy or when they are evidential of the scope thereof.

In particular, the Court received in evidence and refused to strike out the statement testified by Larigan to have been made to him by Joseph Di Palermo that "Gillette was backing the deal" (205). In this connection it is to be observed that although the Court repeatedly ruled that this evidence was not to be considered as evidence of petitioner's participation in the conspiracy or in the substantive offenses charged, the prosecutor, nevertheless, in his summation quoted—and, indeed, misquoted (732) this bit of hearsay testimony as probative of petitioner's guilt.

The Court's rulings in admitting such statements are further discussed in the annexed brief, Point Fourth.

VI.

For the reasons aforesaid petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to the end that its errors aforesaid, if such they be, may be corrected.

Dated, July 13, 1951.

Respectfully submitted,

VINE H. SMITH,
Attorney for Petitioner.

I certify that, in my opinion, the foregoing petition is well founded and that it is not interposed for the purpose of delay.

VINE H. SMITH,
Attorney for Petitioner.